MOTION FILED

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## MOTION FOR LEAVE TO FILE PETITION FOR REHEARING; AND PETITION FOR REHEARING

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## MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner moves for leave to file the attached petition for a rehearing of this Court's Order dated November 9, 1964, denying the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. This motion is made because, as more fully shown by the attached petition for rehearing, this Court, on January 18, 1965, granted the petition for a writ of certiorari in *United States v. Yazell*, 334 F. 2d 454 (No. 575, October Term, 1964).

The questions presented for review in *Yazell* are substantially identical to the questions sought to be reviewed in the case at bar.

Having granted review in *Yazell* subsequent to the denial of the petition for a writ of certiorari in this case, the Court should reconsider its order of November 9, 1964, and grant a review of both cases. A review of both decisions will allow the Court to determine properly the important and difficult conflict between state and federal law.

Respectfully submitted,

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## PETITION FOR REHEARING

Petitioner presents its petition for rehearing of this Court's order dated November 9, 1964, denying the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and, in support thereof, respectfully shows:

## GROUNDS FOR REHEARING

On January 18, 1965, this Court granted a writ of certiorari, previously petitioned for by the United States, in *United States v. Yazell*, 334 F. 2d 454 (No. 575, October Term, 1964). The Fifth Circuit Court of Appeals held there that the Texas law of coverture was a valid defense to a suit brought by the United States under the National Housing Act to recover on a federally insured loan.

The questions presented in the petition for a writ of certiorari in *Yazell* are the following:

> "1. Whether State or federal law is to be applied in determining the obligation of a married woman arises out of a contract executed under the Small Business Act of 1953."
>
> "2. Whether, if federal law governs, the federal courts should fashion a uniform rule rather than adopt the diverse rules of coverture followed in the several States."

The question presented for review in this case is the following:

> "May the Court, pending a mortgage foreclosure, appoint a receiver to collect rents and profits of the mortgaged premises in a situation in which:
>
> (i) an FHA insured mortgage between private parties contains a provision authorizing such an appointment upon default;
>
> (ii) such provision is invalid and unenforceable under the law of the situs; and
>
> (iii) there is no showing of waste, inadequacy of security, insolvency of the mortgagor, and no delay existent or prospective in the foreclosure proceedings?"

The United States has framed the question here as follows:

> "Whether, in an action by the United States to foreclose a war housing insured mortgage, federal law governs the right of the United States to enforce an express provision of the mortgage for the appointment of a receiver of the rents of the mortgaged property [where it is conceded that State law prohibits such appointment]." (Br. Op. 2.)

A brief summary of the factual setting of the case at bar will demonstrate the necessity of granting this petition for rehearing and vacating the Court's order of November 9, 1964, denying the petition for a writ of certiorari.

Petitioner executed a mortgage in favor of Manufacturers Hanover Trust Company to secure a debt of $1,328,400. The mortgage was insured by the FHA pursuant to Section 608 of the National Housing Act, 12 U.S.C. 1743. On September 18, 1963, the mortgagee assigned the mortgage note and the security instruments to the Federal Housing Commissioner pursuant to Section 608(c), 12 U.S.C. 1743(c). On November 19, 1963, respondent commenced a mortgage foreclosure action on behalf of the Federal Housing Commissioner, invoking the jurisdiction of the District Court pursuant to Title 28 U.S.C. §1345. It was alleged that default had occurred in the terms of the mortgage, and the complaint prayed for foreclosure of the security instruments, sale of the property and the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings.

A separate application for the appointment of a receiver pending the foreclosure proceedings was based upon the following term contained in the mortgage itself:

> "[The mortgagee] shall be entitled to the appointment of a Receiver of the rents and profits of the mortgaged prem-

> ises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises * * * such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage."

On March 19, 1964, the District Court entered an order refusing to appoint a receiver, and certifying that the question was appropriate for interlocutory appeal. The Eighth Circuit Court of Appeals permitted such an appeal to be prosecuted, reversed the District Court, and ordered the appointment of a receiver.

The Court of Appeals held that federal law governed the enforceability of the FHA insured mortgage, stating that the issue before it was "whether federal or state law controls the enforceability of the agreement providing for the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings." *The United States has conceded that under Minnesota law the mortgage provision here in question would be unenforceable.*

It is the position of petitioner here that the fundamental issues sought to be reviewed in the case at bar and in *Yazell* are identical, and the disparity of treatment of the two cases, in granting a petition for a writ of certiorari in one and denying the same in the other, is unjustified. Both cases should be reviewed by this Court.

By granting review in *Yazell*, this Court will be called upon to determine an important and difficult question of federal law. The decision in *Yazell* will have far-reaching consequences, including a tremendous impact upon traditional rights, and upon important aspects of the state-federal spheres of control. All federal programs necessarily will be affected

The issues in *Yazell* and the case at bar are so substantially identical as to call for simultaneous review by this Court.

Not only does petitioner have its own substantial rights involved in this case, but also involved are the rights and obligations of all parties who are participants in "federal" programs. Such rights should not be affected by a decision of the Court on the narrow issue of the Texas law of coverture. The basic issue involved should be viewed as broadly as possible, with a full understanding of the consequences of a decision in this area. The granting of the petition for rehearing will afford this Court the opportunity to examine the basic question involved in a more comprehensive and satisfactory manner than would be possible under a review of *Yazell* alone.

## CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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## CERTIFICATE OF COUNSEL

I, D. D. Wozniak, attorney for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

D. D. WOZNIAK
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